

EXHIBIT 5

IN THE HIGH COURT OF JUSTICE

No. HC07C00763

CHANCERY DIVISION

[2007] EWHC 1604 (Ch)

Royal Courts of Justice

Friday, 8th June 2007

Before:

MR. JUSTICE LEWISON

BETWEEN:

THE LAW DEBENTURE TRUST CORPORATION PLC

Claimant

- and -

CONCORD TRUST & Ors.

Defendants

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Quality House, Quality Court, Chancery Lane, London WC2A 1HP
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MR. R. MILES QC and MR. A. CLUTTERBUCK (instructed by Simmons & Simmons) appeared on behalf of the Claimant.

MS. S. PREVEZER QC and MR. E. KING (instructed by Bingham McCutchen) appeared on behalf of the First and Second Defendants.

MR. R. MILLETT QC (instructed by Barlow Lyde & Gilbert) appeared on behalf of the Third Defendant.

JUDGMENT

(As approved by the Judge)

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1 MR. JUSTICE LEWISON:

2
3 1 By an amended complaint of 7th June 2007 Vivendi Holdings 1 Corporation as
4 the assignee of an Elektrim bondholder has brought a complaint against the
5 Law Debenture Trust Corporation and Elektrim SA. That complaint has been
6 brought in the United District Court for the Southern District of Florida,
7 Miami Division. Vivendi Holdings 1 Corporation is a subsidiary of Vivendi,
8 the French media company, which has already made claims against Elektrim
9 and the trustee which I considered in a judgment I gave on 1st May this year in
10 which I decided that the claims as then formulated had no reasonable
11 foundation.

12
13 2 In essence the claims now put forward in the United States District Court
14 traverse much of the same ground so far as the factual basis of the claims is
15 concerned, although, according to the pleader of the amended complaint, the
16 precise legal clothing in which those claims are dressed has to some extent
17 changed.

18
19 3 Elektrim apply by original process for an anti-suit injunction restraining the
20 continuation of those proceedings, and Law Debenture apply by an application
21 in the current proceedings before me for an order joining Vivendi Holdings 1
22 Corporation to those existing proceedings and for a similar anti-suit injunction.
23

24 4 The bases underlying the applications for the anti-suit injunction are two-fold.
25 First, certain provisions of the trust deed pursuant to which the bonds were
26 issued and which are now held by Vivendi Holdings 1 Corporation and,
27 secondly, allegations that the proceedings are vexatious and oppressive, not
28 least because they include a collateral attack on the judgment which I gave on
29 1st May 2007.
30

31 5 The terms of the trust deed under which the bonds were issued include an
32 obligation on the part of Elektrim in clause 15.1(A) "at all times to carry on
33 and conduct its affairs and procure that its subsidiaries carry on and conduct
34 their respective affairs in a proper and efficient manner". One of the
35 subsidiaries was a company called PCT, and one of the allegations that has
36 been made is that shares in PCT were sold to Deutsche Telecom at a
37 considerable undervalue. I have already related a lot of the history in the
38 judgment which I gave on 1st May. Suffice it to say that Elektrim had not paid
39 monies due under the deed of trust, it was pursued by way of bankruptcy
40 proceedings and those bankruptcy proceedings were withdrawn on the basis
41 that it paid over to the trustee €525 million, which represented part of the
42 proceeds of sale of the PCT shares. In my judgment, I held that the trustee at

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1 any rate received those monies as a bona fide purchaser for value without
2 notice of any proprietary claim by Vivendi against those monies.

3
4 6 I should say that under the terms of the documents, Elektrim - this time as
5 principal rather than as guarantor - is potentially liable to make what the
6 documents describe as a contingent payment. The contingent payment is
7 linked to Elektrim's asset value. That same contingent payment is described in
8 the amended complaint in Florida as an equity kicker. It is one of allegations
9 which the trustee makes against Elektrim that it has stripped out some of its
10 assets, thereby reducing the prospect of the contingent payment ever being
11 made. It has begun proceedings in this jurisdiction seeking damages for
12 breach of clause 15.1(A) of the deed of trust, based upon the loss of a chance
13 to recover the contingent payment.

14
15 7 Clause 10 of the deed of trust provides that only the trustee may enforce the
16 provisions of the trust deed and continues that:

17
18 "No Bondholder shall be entitled to proceed directly against the Issuer
19 or the Guarantor to enforce the performance of any of the provisions of
20 these presents unless the Trustee having become bound as aforesaid to
21 take proceedings fails to do so within a reasonable period and such
22 failure is continuing."
23

24 8 Having read the amended complaint, I am satisfied that it covers the same
25 ground as the ground that is covered in the trustee's existing proceedings for
26 damages for breach of clause 15.1, with the consequence that a bondholder is
27 contractually prohibited from bringing proceedings. Vivendi Holdings 1
28 Corporation is such a bondholder and consequently its proceedings in the
29 District Court in Florida are a breach of the deed of trust by which in its
30 capacity as bondholder it is bound.

31
32 9 The amended complaint seeks to circumvent the judgment which I gave on
33 1st May by alleging that the judgment was given in ignorance of facts which
34 ought to have been disclosed to the court by Elektrim and/or Law Debenture
35 Trust Corporation. That, in my judgment, is plainly a collateral attack on a
36 judgment of the English court. It follows, in my judgment, that on the basis of
37 the material I have seen the proceedings begun by Vivendi Holdings 1
38 Corporation in Florida are both a breach of contract and also designed as a
39 collateral attack on a judgment of mine.

40
41 10 Mr. Millett QC, on behalf of Elektrim, also submits that they are oppressive in
42 the sense that his client, Elektrim, is exposed to double jeopardy for the same

1 underlying facts, once at the suit of the trustee and, secondly, at the suit of
2 individual bondholders. I agree with that too.

3
4 11 In addition, because the first two defendants to the existing proceedings have
5 been appointed as representatives of all the bondholders, that is to say Concord
6 Trust and Axiona(?) SA, the judgment which I gave on 1st May 2007 binds
7 them as parties to the proceedings in which they are represented. That
8 provides another reason why Vivendi Holding 1 Corporation, which is a
9 successor in title to one of the bondholders subject to that representation order,
10 ought not to be allowed to maintain its Florida proceedings.

11
12 12 So far as the question of service out of the jurisdiction is concerned, I am
13 satisfied that the claim by Elektrim was made in respect of a contract governed
14 by English law and consequently falls within rule 6.20(5)(c) of the Civil
15 Procedure Rules. In addition, the claim relates to money which is located
16 within this jurisdiction, that is to say the fund in the hands of the trustee.
17 Consequently, it also falls within 6.20(10).

18
19 13 So far as the trustee's claim is concerned, it also falls within those two
20 paragraphs and, in addition, the trustee applies - rightly, in my judgment - to
21 join Vivendi Holdings 1 Corporation as an additional party to the existing
22 action under rule 19.2 of the Civil Procedure Rules, as being a person with
23 whom there is an issue which is already the subject of proceedings pending in
24 this jurisdiction.

25
26 14 In terms of the discretion to permit service out of the jurisdiction, the
27 proceedings in essence involve a trust which is domiciled in this jurisdiction,
28 which is administered in this jurisdiction, where the trustee is resident in this
29 jurisdiction, where the principal trust assets are located within this jurisdiction
30 and which is expressly stated to be subject to English law. The pleaded
31 connections with Florida are, in my judgment, tenuous in the extreme.

32
33 15 The question that has troubled me is whether I should make an order without
34 having heard what Vivendi Holdings 1 Corporation has to say. Although this
35 is, strictly speaking, an application without notice, in fact short notice has been
36 given to Vivendi Holdings 1 Corporation and I have received and read a letter
37 from Mr. Angueira, the Florida attorney representing Vivendi Holding 1
38 Corporation. The arguments which he advanced in support of the contention
39 that the claims have nothing to do with the trust deed are, in my judgment,
40 tenuous arguments and it is, in my judgment, the case that the substance of the
41 complaint exactly mirrors the substance of the trustee's proceedings for breach
42 of clause 15.1.

1 16 I consider therefore that there has been, albeit limited, an opportunity for
2 Vivendi Holdings 1 Corporation to make the points that it wishes to make. It
3 is, I accept, desirable that the proceedings in Florida should not be allowed to
4 gather momentum and it may well be, although Mr. Millett does not concede
5 this, that Elektrim is liable to pay interest on the amount of money in the hands
6 of the trustee at a rate of approximately €100,000 per day. Delay is therefore
7 expensive.

8
9 17 For those reasons I will make the anti-suit orders at the behest both of Elektrim
10 and of the trustee and I will give permission to serve those orders and the
11 accompanying claim forms and application notices out of the jurisdiction.
12 I will also make an order joining Vivendi Holdings 1 Corporation to the
13 current Part 8 proceedings.

14
15 MR. MILLETT: My Lord, could I just clarify one point? In relation to service out,
16 I am not sure in your Lordship's judgment you expressly dealt with 6.20.3,
17 which is the necessary and proper party claim. Your Lordship dealt with the
18 question of joinder but it would be helpful if your Lordship would perhaps rule
19 on that point too.

20
21 MR. JUSTICE LEWISON:

22
23 18 There is plainly a dispute about what, if anything, the trustee should do with
24 the sum of money which is currently in its hands. The representative
25 bondholders urge the trustee to distribute. It appears from the amended
26 complaint that Vivendi Holding 1 Corporation requires the money to be kept in
27 the trustee's hands and not distributed. That dispute must be resolved and it
28 follows, in my judgment, that Vivendi Holdings 1 Corporation is a necessary
29 and proper party to the existing proceedings.

30
31
32

IN THE HIGH COURT OF JUSTICE

No. HC07C01505

CHANCERY DIVISION

[2007] EWHC 1605 (CH)

Royal Courts of Justice

Friday, 29th June 2007

Before:

MR. JUSTICE LEWISON

BETWEEN:

ELEKTRIM SA

Claimant

- and -

VIVENDI HOLDINGS I CORPORATION

Defendant

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MR. R. MILLETT QC and MR. P. McGRATH (instructed by Barlow Lyde & Gilbert) appeared on behalf of the Claimant.

MR. A. MALEK QC and MR. D. QUEST (instructed by Orrick) appeared on behalf of the Defendant.

JUDGMENT

(As approved by the Judge)

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1 6 Mr. Millett QC says that, in effect, the complaint as sought to be amended
 2 treats Mr. Solorz as the *alter ego* of Elektrim and, therefore, what I am in
 3 effect being asked to do is to declare that my order made earlier this month
 4 extends to a person, who in legal terms is the same as Elektrim SA, and that
 5 would include Mr. Solorz in circumstances where he is being sued as the *alter*
 6 *ego* of Elektrim.

7
 8 7 There is, in my judgment, considerable force in that submission. If it were the
 9 case that Vivendi Holdings 1 Corporation simply sidestepped the order which
 10 I granted by suing Mr. Solorz as the *alter ego* of Elektrim, that would, in my
 11 view, justify the extension of the injunction. But whether that is the case is
 12 essentially, as it seems to me, a matter for the Seattle court to determine by an
 13 examination of the amended complaint sought to be put before it. As it seems
 14 to me, on what I have to accept is a relatively cursory examination of the third
 15 amended complaint, there are allegations made against Mr. Solorz which do
 16 not seem to me to rely on the proposition that he is to be treated simply as the
 17 *alter ego* of Elektrim.

18
 19 8 Paragraph 2 of the amendment alleges that T-Mobile conspired with Solorz
 20 and Elektrim under Solorz's control to do various things. Mr. Solorz and
 21 Elektrim are pleaded in that paragraph as two separate conspirators. In para.77
 22 there is an allegation that the asset stripping alleged was done to allow
 23 Mr. Solorz to enrich himself without fear of being held accountable.

24
 25 9 Count two in para.149 alleges a claim against Mr. Solorz for operating
 26 Elektrim as a corrupt enterprise and para.169 pleads a specific statement by
 27 Mr. Solorz himself, which is later in the complaint alleged to have been false.
 28 Paragraph 169 also makes allegations against Mr. Solorz of causing Elektrim
 29 to be stripped of his shares and, as I understood Mr. Millett in his last remarks,
 30 he accepts that that is a separate standalone obligation which would not be
 31 caught by the injunction anyway.

32
 33 10 This not being a case in which there is a legal right not to be sued, this is a case
 34 in which the principles of comity have a much greater weight than in cases
 35 where this court is simply being asked to enforce a contract. I do not consider
 36 that this is an appropriate case to take the extraordinary step of interfering with
 37 the process of a foreign court. In my judgment, it will be for the Seattle court
 38 to decide whether or not these proceedings are in breach of the injunction
 39 which I granted. I am, however, prepared to say that when I referred to the
 40 claimant in my order I would have included anyone who is equivalent to the
 41 claimant and who is sued simply as the *alter ego* of the claimant, Elektrim.

42
 43
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1 MR. JUSTICE LEWISON:

2
3 1 This is an application to extend the scope of an anti-suit injunction, which
4 I granted in early June and which was continued by undertakings on, I think,
5 15th June. The order was granted to restrain Vivendi Holdings 1 Corporation
6 from continuing proceedings in Miami against Elektrim AS and the Law
7 Debenture Trust.

8
9 2 The basis on which I granted that injunction was that Vivendi Holdings 1
10 Corporation as a bond holder was bound by the terms of the trust deed, which
11 required claims against Elektrim for breaches of the terms of the trust deed and
12 the bonds to be brought by the trustee rather than by the bond holders, and also
13 precluded proprietary claims being made against the trustee as a result of a
14 judgment which I gave on 1st May.

15
16 3 The current application concerns a proposal to join Vivendi Holdings 1
17 Corporation as an additional plaintiff to a complaint which has been made in
18 the United States District Court for the Western District of Washington at
19 Seattle. The matters sought to be pleaded in the third amended complaint do
20 not, in my view, amount to a collateral attack on my judgment of 1st May.
21 That judgment dealt only with the possibility that Vivendi SA might be able to
22 pursue a proprietary claim against the trustee.

23
24 4 The question for decision is whether Vivendi's claim was a bar to the trustee
25 distributing monies which it had received towards the redemption of the bonds.
26 I held that the claims were no such bar on the grounds that the claims were
27 fanciful claims, but I reached that conclusion partly because of an order made
28 by an arbitral tribunal releasing the money for payment of the bonds, and
29 partly also on the ground that the trustee was a *bona fide* purchaser for value
30 without notice of the proprietary claim.

31
32 5 In the present case, the application to extend the anti-suit injunction is made by
33 Elektrim SA. But one of the unusual features of the application is that the
34 proceedings which it seeks to restrain are not proceedings brought against it,
35 but are proceedings brought against Mr. Solorz, who is I understand a
36 shareholder and director of Elektrim. It is common ground that Mr. Solorz is
37 not a party to any contract which gives him a legal right not to be sued in a
38 particular jurisdiction. The application, therefore, is based on the proposition
39 that the proposed amendments to the complaint before the Seattle court would
40 amount to oppressive and vexatious proceedings.